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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 966

JOHN KASPER, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit which affirmed judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, finding petitioner guilty of criminal contempt of court and sentencing him to six (6) months imprisonment.

OPINION BELOW

The opinion of the Court below has not yet been officially reported. Copy of the opinion and judgment are annexed hereto and printed in the Appendix.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 27, 1959 (App. No. 1a); a Petition for Re-hearing was timely filed and said Petition for Re-hearing was denied on April 30, 1959 (App. No. 24a). The jurisdiction of this court is invoked pursuant to the provisions of 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. The injunction which the appellant allegedly violated shows on its face that it is repugnant to and violative of the First Amendment of the United States Constitution.

2. The procedure followed against the appellant deprived him of due process of law under Amendment V of the United States Constitution in the following respects:

a. The permanent injunction was issued in this case in violation of Rules 17 and 65 of the Federal Rules of Civil Procedure.

b. Appellant was never served with a copy of the original desegregation order entered by the trial court on January 4, 1956, and the appellant was not a party to the case, so he can not be guilty of violating said order.

c. The appellant's Motion for a Bill of Particulars in the trial court was denied, so that appellant could not adequately prepare his defense.

d. The appellant's Motion to Produce Government Documents prior to trial was denied so that appellant could not adequately prepare his defense. The procedure followed in the instant case

deprived appellant of the protections enumerated in the Bill of Rights of the federal constitution.

3. The trial and conviction of appellant in this proceeding again places appellant in jeopardy in violation of the Fifth Amendment of the United States Constitution.

4. The trial court did not have jurisdiction over the appellant at any time, and the court lacked jurisdiction to enter the permanent injunction of September 6, 1956.

5. The permanent injunction and the Amended Order for Attachment were issued in violation of the Fourteenth Amendment of the United States Constitution.

6. The permanent injunction and the Amended Order for Attachment were issued in derogation of Section 4 of Article IV of the United States Constitution.

7. The evidence adduced in the trial court failed, as a matter of law, to establish the guilt of the appellant beyond a reasonable doubt.

8. The allegations against the defendant Kasper in the Amended Order for Attachment, even if true, do not, as a mater of law, constitute a criminal contempt of Court for which appellant could be punished.

9. The court's charge to the jury was prejudicial to the appellant.

10. The verdict of the jury was contrary to the evidence and the weight of the evidence.

11. The jury was tampered with by employees of a network broadcasting company to produce a network

television program wherein the foreman of the jury (Mr. May) was directly involved and Juror May viewed the television program, thus failing to follow the instructions of the Court.

12. The Court erred in withholding from defense counsel certain of the F.B.I. files pertaining to witnesses who testified for the government, failing to make available to counsel all statements made to the F.B.I. by said witnesses.

13. The court erred in denying appellant's Motion to Produce Government Documents so that F.B.I. statements would be made available to counsel prior to trial and counsel for appellant was greatly impeded in cross examination of government witnesses by virtue of court making available F.B.I. statements only after the witness had testified.

14. The court undercut appellant's position during the trial that Reverend Turner's act could reasonably invoke hostility and would be generally characterized from appellant's standpoint as a bad deed, whereas the court charged the jury that his act was a good deed.

15. The distribution of the "Handbook for Jurors" to the jurors prior to their sitting as jurors in this case gave the jurors misconceptions of their duties, functions, and reasoning processes, which deprived the appellant of a fair, impartial trial.

16. Appellant filed a Motion for a Speedy Jury Trial shortly after appellant was made a party to this proceeding. The record shows that several months intervened before trial, which prejudiced the rights of the appellant.

17. Since appellant's co-defendants were not parties to the permanent injunction and are only charged with constructive notice of its issuance, this conviction can not stand.

STATEMENT OF CASE

The appellant was previously before this court (*Kasper v. Brittain*, 245 F. 2d 92, 6th Cir. cert. denied 355 U.S. 834 on a conviction of criminal contempt for which he was sentenced for a term of one year. It will serve no useful purpose to recount in this statement the data which appeared in the former appeal. In the instant case, an Amended Order for Attachment (App. No. 12a) was issued in the trial court on February 25, 1957, wherein this appellant was named a party and a prior Order for Attachment against the other appellants (and other parties not now before the Court) was abandoned, whereas in the prior Order for Attachment Joheather McSwain and other individuals who were plaintiffs in the original equity action were the plaintiffs, the Amended Order for Attachment was issued on behalf of the United States against the appellant and others. The Amended Order for Attachment, after reciting the issuance of the original de-segregation Order on January 4, 1956, directing the discontinuance of racial segregation in Clinton High School, then recites that on August 29, 1956, certain individuals petitioned for injunctive relief and that on September 6, 1956, a permanent injunction was issued restraining the appellant and certain other parties (none of the other parties are before the Court) as follows:

> It is ordered and decreed by the court that the aforementioned persons, their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them, be and they hereby are enjoined and prohibited from

further hindering, obstructing, or in any wise interfering with the carrying out of the aforesaid order of this Court (meaning the order of January 4, 1956) or from picketing Clinton High School, either by words or acts or otherwise.

The Amended Order for Attachment then recites that this appellant and the other appellants "during the months of November and December, 1956, entered into an agreement or agreements to violate and to cause others to violate the said permanent injunction issued September 6, 1956," and further alleging that the appellant acted in concert and participation with the other appellants and violated the permanent injunction issued by the Court on September 6, 1956 "by hindering, obstructing, and interfering with the carrying out of the order directing desegregation issued by this court on January 4, 1956."

The Amended Order in paragraph number one states that on or about November 27, 28, 29, 30, and December 3, 4, 1956, the other defendants below congregated in a threatening manner along the route to the Clinton High School taken by the negro students and intimidated them from attending Clinton High School.

Paragraph number two was abandoned because John Gates died in the meantime.

Paragraph number three states that on December 4, 1956, certain of the other defendants below villified and attacked Reverend Paul Turner when he escorted the negro students to said high school. It will be noted from the Amended Order of Attachment that Frederick John Kasper is not named as having participated in the activities enumerated in paragraphs one and three of the Amended Order for Attachment.

The jury returned a verdict of guilty and appellant was sentenced to 6 months' imprisonment. The 6th Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The injunction which the appellant allegedly violated shows on its face that it is repugnant to and violative of the First Amendment of the United States Constitution.

The courts have zealously protected the rights of freedom of speech and freedom of assembly as guaranteed in the First Amendment as the latest enunciation by the Supreme Court shows in the case of *Staub* v. *City of Baxley,* 355 U.S. 313, 2 L. Ed. 302, 78 S. Ct. 277.

In the *Staub* case the court held an ordinance of the city of Baxley, Georgia, unconstitutional as a prior restraint on freedom of speech. The ordinance required a license of any person who seeks to solicit membership in "any organization, union, or society of any sort which requires from its members the payment of membership fees, dues, or is entitled to make assessment against its members." Staub was convicted for "Soliciting members for an organization without a permit" and the court held this amounted to a prior restraint upon freedom of speech since the permit is not issued as a matter of course, but only upon the affirmative action of the Mayor and the City Council" and "it thus makes enjoyment of speech contingent upon the will of the Mayor and Council of the City although that fundamental right is made free from Congressional abridgment by the First Amendment."

In the case of *Terminiella* v. *Chicago,* 337 U. S. 1 (1949), the clear and present danger rule was also before the Supreme Court. A Chicago ordinance was judicially interpreted to permit punishment for breach

of the peace for a speech which "stirs the public to anger, invites disputes, or brings about a condition of unrest" was a substantial and unlawful restriction of the right of free speech. In that case a riot had actually occurred and the speech in question had in fact "provoked a hostile mob, incited a friendly one, and threatened violence between the two." The Court reversed a conviction under the ordinance and Justice Douglas wrote:

> "A function of free speech under our system of government is to invite dispute. It may, indeed, best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudice and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. This is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

The length to which the Supreme Court has gone in protecting freedom of speech is illustrated in the case of *Yates et al.* v. *United States*, 354 U. S. 298, 77 S. Ct. 1064, and the issues in that case were whether or not it was a violation of the Smith Act.

> "... to advocate and teach the duty and necessity of overthrowing the government of the United States by force and violence and (2) to organize as the communist party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit."

The Court supported the right of persons in that case to advocate the overthrow of our government by force and violence so long as it clearly remained in the realm of advocacy. In view of this protection which the Supreme Court has given members of the Communist Party, is there any rational reason why the same protection should not be given to segregationalists? It is respectfully submitted that under the permanent injunction issued in this case, freedom of speech and freedom of assembly and the right to petition for redress of grievances on this subject are all snuffed out in Anderson County, Tennessee.

2. The procedure followed against the appellant constitutes a denial of due process of law to the appellant under Amendment V of the United States Constitution.

a. The permanent injunction was issued in this case in violation of Rules 17 and 65 of the Federal Rules of Civil Procedure.

b. Appellant was never served with a copy of the original desegregation order entered by the trial court on January 4, 1956, and the appellant was not a party to the case, so he can not be guilty of violating said order.

c. The appellant's Motion for a Bill of Particulars in the trial court was denied, so that appellant could not adequately prepare his defense.

d. The appellant's Motion to Produce Government Documents prior to trial was denied so that appellant could not adequately prepare his defense. The procedure followed in the instant case deprived appellant of the protection enumerated in the Bill of Rights of the federal constitution.

a. The permanent injunction was issued in this case in violation of Rules 17 and 65 of the Federal Rules of Civil Procedure.

Rule 17 of the Federal Rules of Civil Procedure provides that every action should be prosecuted in the "name of the real parties in interest." The record

discloses in this case that the applicants for the temporary restraining order, (App. No. 11a) preliminary injunction, and permanent injunction were not the real parties in interest. The real parties in interest would be the Board of Education in its official capacity, as followed in *Brewer* v. *Hoxie School District, No. 46*, 238 F. 2d 91. *Cf. United States* v. *United Mine Workers of America*, 330 U. S. 258. The applicants were private individuals petitioning in no official capacity, and not parties in interest.

Rule 65 of the Federal Rules of Civil Procedure provides:

> No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; . . .

And subdivision (d) provides:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

There was no allegation or showing in the Petition for the Temporary restraining order (App. 11a) that immediate and irreparable injury would be sustained by the petitioners, and indeed those petitioners were in no legal position to make such a showing, anyway. They did not apply in any official capacity; they applied only as individuals, so the temporary restraining order was invalid because it was issued without notice in violation of that rule. It follows, that the temporary restraining order having been illegally issued, the preliminary injunction and the permanent injunction were also illegally issued.

Rule 65(d) provides that an injunction is binding only upon the *parties to the action*, their officers, agent, servants, employees, and attorneys, and upon those persons in active concert or participation with them. It is crystal clear that appellant does not qualify under that criteria; therefore, the permanent injunction was issued in violation of that rule. The court did not have jurisdiction over him and did not acquire jurisdiction over him by reason of which the permanent injunction is of no force and effect with respect to the appellant.

The court held in the prior Kasper appeal that he could be punished even though "it (injunction) may seemingly be challenged as invalid." That is the law where the court has *jurisdiction of the person and the subject matter.* The cases cited by this court in the former opinion; namely, *Howat* v. *Kansas*, 258 U. S. 181, 189; *United States* v. *United Mine Workers of America*, 330 U. S. 258, 293; and *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 211 F. 2d 449, 452 (C.A. 6) support this proposition instead of refuting it. The above quoted statement appeared in the

Howat case and was reiterated in the *United Mine Workers* case; however, in both cases the court specificially held there was jurisdiction of the person and the subject matter.

It is appellant's position that since the Court did not follow procedural due process, it did not obtain jurisdiction over him incident to issuance of the permanent injunction. The Court had no power to make that injunction and the injunction is null and void as clearly pointed out by the Supreme Court in *In Re Sawyer*, 124 U. S. 200 at page 221:

> "The Circuit Court (of the United States) being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of contempt in disregarding that order is equally void, their detention, by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 113 U. S. 713 and *In re Ayers*, 123 U. S. 443, 507." See also *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418; *Ex parte Harding*, 120 U. S. 782; *Ex parte Terry*, 128 U. S. 289.

b. Appellant was never served with a copy of the original desegregation order entered by the trial court on January 4, 1956, and the appellant was not a party to the case, so he can not be guilty of violating said order.

Appellant was never served with a copy of the original desegregation order entered by the trial court on January 4, 1956, and that is the basic order he is charged with violating. Since he was not a party to the case and since that order was not served upon him, he

could only be charged with constructive notice of said order as pointed out in the case of *Kelton* v. *United States*, 294 F. 491; *In re Kwelman*, 31 F. Supp. 23. The theories of constructive knowledge have no place in the criminal law. There is no doubt that a prosecution for criminal contempt is a crime. *Cf. Pettibone* v. *United States*, 148 U. S. 197, and dissenting opinion in *Green et al.* v. *United States*, decided by the Supreme Court on March 31, 1958, Case No. 100.

c. The appellant's Motion for a Bill of Particulars in the trial court was denied so that appellant could not adequately prepare his defense.

Appellant's Motion for a Bill of Particulars (App. 17a) sought information which was on its face indispensably necessary for appellant to prepare his defense, but the Court denied that Motion (App. 19a).

d. The appellant's Motion to Produce Government Documents prior to trial was denied so that appellant could not adequately prepare his defense.

Appellant's Motion to Produce Government Documents (App. 21a) was also denied by the Court (App. 21a), and the case of *Jencks* v. *United States*, 353 U. S. 657, 77 S. Ct. 1007, supports appellant's position that he was entitled to have that information in advance of trial in order to prepare his defense and effectively cross-examine government witnesses.

3. The trial and conviction of appellant in this proceeding again places appellant in jeopardy in violation of the Fifth Amendment of the United States Constitution.

An examination of the record in the prior Kasper Appeal, *Kasper* v. *Brittain*, 245 F. 2d 92, (6th Cir., 1957) cert. denied 355 U. S. 834, and the record in this case shows that the appellant has again been convicted

for the same conduct which constituted the basis for the prior conviction. The proceedings in the instant case is but a transparent attempt to multiply offenses. Such a practice was condemned in the cases of *United States v. Costello,* 2 Cir. 198 F. 2d 200, and *United States v. Orman,* 3 Cir. 207 F. 2d 148, both of which cases were cited with aproval by the Supreme Court in the case of *Yates v. United States,* 78 S. Ct. 128, 133. As pointed out by Justice Douglas in the dissenting opinion in the *Yates* case, page 135, this rule gives the prosecutor and judge an awful power to create crimes as they choose. The record in the instant case shows that the other defendants knew Kasper; some appeared at his trial on State charges in Clinton, Tennessee; some signed his bond in the previous case, and other such irrelevant matter. The record does not show that Kasper participated in or was cognizant of the overt acts in any manner whatsoever, or that he was even in the area at that time. Turner only decided to take the negro children to school on November 29, 1956 (App. 22a).

It is submitted under this criteria that if subsequently other people do anything to resist integration respecting the Clinton High School, they could be brought in in the same manner, and Kasper again be charged, and convicted (assuming complete innocence) along with them, with conspiracy, if the criteria in this case is approved. It amounts to charging and convicting a person of a crime committed by remote control or mental telepathy which is so fantastic there is no precedent.

4. The trial court did not have jurisdiction over the appellant at any time, and the court lacked jurisdiction to enter the permanent injunction of September 6, 1956.

Appellant takes the position that the permanent injunction entered in the case on September 6, 1956, is invalid.

Where the litigation underlying the court's order or decree allegedly violated is cognizable at law, a court acting as a court of chancery has no jurisdiction; and therefore no violation or resistance to the order or decree is punishable as a contempt. *In Re Sawyer,* 124 U. S. 200; 12 ALR 2d 1083-1084. There is, it is true, a distinction between "equity jurisdiction," in the sense intended here, as power to deal with the class of litigation involved, and, on the other hand, "equity jurisdiction" in a loose sense referring merely to the question whether a particular mode of relief is appropriate to a particular cause in fact within the powers of equity generally. See *Fook's Executors* v. *Ghinger,* 192 A. 782, cert, den. 302 U. S. 726. On making the distinction, the court said: "Courts of equity exercise a well-defined jurisdiction over certain classes of cases; a jurisdiction inherent in the court although sometimes enlarged or curtailed by statutes. Any attempt by such a court to hear or determine a case not within either its inherent or statutory powers would result in a void decree rendered without jurisdiction of the subject matter."

The District Court's original decree, which appellant is said to have resisted, obviously constitutes a mandatory injunction. In addition to the textbook principle that chancery cannot issue a mandatory injunction which would compel a continuing performance or require continuing supervision from the courts, the principle is elementary that chancery is without power to

compel affirmative conduct by public officials, since there is an exclusive remedy at law, on behalf of anyone injured by official conduct, that remedy being by way of mandamus; and therefore the mandatory decree must be interpreted, if possible, as being in effect a writ of mandamus, so that all of the considerations and principles applicable to mandamus must be applicable to the decree if it is to be construed as having been issued by the court while acting within its powers as a court at common law. *Miguel* v. *McCarl*, 291 U. S. 442; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28. *Cf. In Re Sawyer, supra.*

Certainly the appellant needs not expound, within this petition, the elementary principles of mandamus, in order to convince this Court that none of those principles were applied to the injunction involved here. The conclusion is inescapable, then, that this injunction was no more than an abortive attempt at applying chancery procedures, and hence chancery jurisdiction, to a subject matter exclusively within the jurisdiction of the common law.

This point alone requires that appellant's conviction be set aside. *In Re Sawyer, supra.* But in addition, the following points must be considered.

Equity cannot interfere with political matters misnamed as "civil rights." *Giles* v. *Harris*, 189 U. S. 475; *Lane* v. *Wilson*, 307 U. S. 268, 272; *Stefanelli* v. *Minard*, 342 U. S. 117; *Williams* v. *Dalton*, 231 F. 2d 646. (Note that the latter case post-dates the Segregation Cases.)

In the *Giles* case, Mr. Justice Holmes said: "It seems impossible to grant the equitable relief which is asked. . . . The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. . . . In de-

termining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. . . . The . . . Court has no constitutional power to control [State] action by any direct means. And if we leave the State out of consideration, the Court has little practical power to deal with the people of a State in a body."

There were no pecuniary or property rights alleged at issue in the litigation leading to the injunction involved here; and yet the principle is fundamental in federal courts that chancery has power only over proprietary interests. *Re Sawyer, supra; In Re Debs,* 158 U. S. 564, 593; *International News Service* v. *Associated Press,* 248 U. S. 215, 236; *Coven* v. *Clark,* 78 F. Supp. 295.

Finally, the District Court was without jurisdiction in issuing its secondary injunction, not only because the primary injunction was invalid as a mandamus and beyond the court's power to issue as a mandatory injunction, but also because the secondary injunction, as interpreted by the Court itself, operates as an injunction against ordinary crimes and misdemeanors—whereas the point is elementary that courts of chancery cannot enjoin crimes. *Re Sawyer, supra.* The rule is subject to the single exception that the crime of "public nuisance" may be enjoined in the extent necessary to prevent continuing injuries against property. *In Re Debs, supra.* It is true that "criminal equity" was the ancient jurisdiction of the Star Chamber, but Star Chamber jurisdiction was abolished by statute in 1614. (16 Charles I, c. 10.)

For purposes of this petition only, appellant assumes that the ruling of the United States Supreme Court in

Brown v. *Board of Education*, is valid, and not a judicial usurpation of political power. Likewise, appellant assumes for purpose of argument that the subsequent decree issued in that cause, 349 U. S. 294, is capable of being construed as valid.

According to the Court's opinion in the first Kasper appeal (p. 4), the Supreme Court's decree remanded the cases "to the district courts to take such proceedings and enter such orders and decrees consistent with the opinion, as are necessary *and proper* to admit the parties to the public schools on a racially non-discriminatory basis, with all deliberate speed." (Emphasis added.)

The duty of lower federal courts undoubtedly is to construe this decree as being valid—that is, to construe it in such fashion that it may harmonize with the fundamental principles of equity jurisprudence as recognized in Supreme Court decisions throughout the years. Otherwise, the lower courts, and particularly this Court of Appeals, are faced with the paradox that in complying with one decision they must on their own initiative overrule scores of decisions rendered by the Supreme Court and never, expressly or by necessary implication, disturbed by that tribunal.

In light of the basic principles governing chancery jurisdiction, then, the only "proper" action that the lower courts could take, in maximum obedience to the Supreme Court's decree, would consist in interpreting that decree as authorizing and ordering them to issue *prohibitory* injunctions, against state officials, forbidding the operation of public schools in accordance with any state constitutions, statutes, or governmental customs rendered presumably unconstitutional and void by

the Supreme Court's decision—in other words, the procedure universally followed heretofore in dealing with unconstitutional acts.

In fact, the appropriate section of the Judicial Code, 28 U. S. C. 2281, authorizes the three-judge court, in the first place, only to issue "an interlocutory or permanent injunction *restraining* the enforcement, operation or execution of any State statute by *restraining* the action of any officer of such State in the enforcement or execution of such statute . . ." This is the language of prohibitory injunction. It does not authorize a court to impose some judicial policy in lieu of unconstitutional State constitutions, statutes, or governmental customs, either by mandamus or by some sort of mandatory injunction. Hence the mandatory injunction issued in this case was in the teeth of all authority, and wholly beyond the Court's jurisdiction. Therefore, appellant cannot be punished for any violation of it.

In fact, although the injunction issued by the three-judge court in South Carolina was a mandatory decree made prohibitory in form through the sham device of the double negative, that Court did state the interpretation of the Supreme Court's decree which accords with appellant's contentions here. At 132 F. Supp. 776, Circuit Judge Parker said:

> ". . . it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the state. . . . What it has decided, and all that it has decided, is that a state may not deny any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, *does not require integration.* . . ." (emphasis added)

It is a far different matter for the courts to say, to a public official, that he must close the schools unless the State gives him authority to integrate them, than it is for the courts to say, to such an official, that he must integrate the schools unless the State gives him authority to close them. The first case is within the powers of equity—provided an appropriate suit is brought by some one who can show that his property interests, as a taxpayer for example, would be injured irreparably by continued administration of the unconstitutional statute or custom. Otherwise, he is left to his remedies at common law. See, for example, *Terrace* v. *Thompson*, 263 U. S. 197; *Champlin Co.* v. *Corp. Comm.*, 286 U. S. 210. But the second case is not only beyond the powers of equity; it is even beyond the powers of a court of common law when duly presented with a petition for mandamus.

Whether the officials in a particular state would have authority to continue operation of public schools in the face of a prohibitory injunction against the enforcement of any unconstitutional statutes or customs, requiring separation of the races, must be a matter purely for the state legislatures and the state courts to decide. It can be no lawful concern of the federal courts.

5. The permanent injunction and the Amended Order for Attachment were issued in violation of the Fourteenth Amendment of the United States Constitution.

The Supreme Court based the decision of *Brown et al.* v. *Board of Education*, 347 U. S. 483, upon the Fourteenth Amendment; to deprive the negro children the right to enter a particular school deprives them of "equal protection of the law."

The Fourteenth Amendment contains some clear and plain words in its Fifth Section as follows:

"The Congress shall have power to enforce by appropriate legislation the provisions of this Article."

Nothing is said about the judiciary enforcing the amendment and no authority is given to the executive branch to enforce the amendment. The sole power to enforce the 14th Amendment is vested in the representatives of the people (Congress) which is required to act "by appropriate legislation." Congress has passed no legislation to enforce the Fourteenth Amendment in respect to schools. The Courts should not be placed in the position of legislating. The Courts have consistently held the 14th Amendment applies only to the states and does not apply to any private individuals. The 10th Amendment further fortifies this position.

The 15th Amendment conferring the right to vote contains the same provision as the 14th Amendment in that its enforcement shall be by appropriate legislation. The last Congress, after extensive hearings and debate passed the so-called "Civil Rights Bill" providing injunctive procedures to protect the right to vote. Until the Congress acts to provide enforcement legislation in respect to integrating state supported public schools the dilemma will only be increased as time goes on. If the Federal Courts have the injunctive power utilized in the instant case, then there was no necessity for such extensive hearing, debate and legislative action as the last Congress rendered respecting the 15th Amendment.

The 14th Amendment relates to State action any way. A good discussion on this point is the very recent case of *State* v. *Clyburn* (N. C.), 101 S. E. 2d 295.

The instant case clearly reflects an additional trend of judicial legislation which can only lead into a legal wilderness.

6. The permanent injunction and the Amended Order for Attachment were issued in derogation of Section 4 of Article IV of the United States Constitution.

Neither the President nor the United States Courts have independent jurisdiction over the maintenance of law and order in a state. Section 4 of Article IV of the Constitution provides that the United States may move against "domestic violence" only on "application of the Legislature, or of the Executive (when the Legislature cannot be convened)." In the absence of such application from the Legislature of the state, the United States Governmen. completely lacks authority to enforce state police laws. This type of broad injunction is clearly aimed as a police measure, and such has subsequently clearly developed.

The record in this case shows that F.B.I. agents and United States Marshals are being utilized to maintain law and order in the State of Tennessee and that such assistance has not been requested by the State Legislature nor the Governor of that State. Indeed, the record in this case shows that the State has been able to maintain law and order, so there was no necessity for the federal police power being utilized, especially without constitutional requirements being followed. The ruling of this Court in the prior *Kasper* case renders this provision of the Constitution meaningless, therefore the point is again presented.

7. The evidence adduced in the trial court failed, as a matter of law, to establish the guilt of the appellant beyond a reasonable doubt.

The evidence adduced shows only that the appellant knew the co-defendants; that one or more of the co-defendants appeared at his State trial in Clinton, Tennessee, in September of 1956; that two of the co-defend-

ants signed his bail bond in August 1956, and such is the extent of the relationship established between appellant and the other defendants. The evidence did not establish any contact of appellant with other defendants, proximate to the overt acts alleged. The hearings in the trial court were so voluminous that appellant would be unable to print the testimony in its entirety, and indeed the rules of this court may prohibit such a voluminous record, but the court is urged to scan the transcript of testimony filed with the record on appeal and the court will ascertain that the only basis the jury could have had for returning its verdict would be based upon "guilt by error association." It was not shown that appellant was even in the state of Tennessee when the overt actions set forth in the Amended Order for Attachment were committed. In this connection, it is important to note that the overt acts alleged in said Order constitute State offenses, so it is up to the State to mete out any punishment warranted. This again illustrates the evil of both state and federal concurrent jurisdiction because it generates Federal offenses through judicial legislation. See argument on Point 5 of this appeal.

8. The allegations against the defendant Kasper in the Amended Order for Attachment, even if true, do not, as a matter of law, constitute a criminal contempt of court for which appellant could be punished.

Appellant submits that, considering all of the allegations against the appellant as set forth in the Amended Order for Attachment, there is no basis to warrant the summary proceedings instituted against appellant. It is appellant's position that in such a situation the State authorities have jurisdiction to deal with the matters involved and no federal question is involved. Further-

more, if the appellant committed any criminal conduct, the proceedings against him should be by indictment where he would be afforded all of the protection of the Bill of Rights. *Nye v. U. S.*, 313 U. S. 33, 85 L. Ed. 410. This particularly is true because there was no emergency, as witness the chronology of events; namely, the Order for Attachment was issued against the other defendants on December 5, 1956; the Amended Order for Attachments was issued on February 25, 1957, and the appellant, even though he demanded a speedy trial, was not placed on trial until July 8, 1957, so there was no legal justification for such summary proceedings against the appellant depriving him of basic constitutional protections. See also dissenting opinion by Judge Black in *Gilbert Green et al. v. United States*, decided by the Supreme Court on March 31, 1958, No. 100.

If appellant is punished in this proceeding the offense or crime is judicially created.

9. The court's charge to the jury was prejudicial to the appellant; and 10. The verdict of the jury was contrary to the evidence and the weight of the evidence.

The points involved in 9 and 10 are so interrelated that they will be discussed together.

Appellant urges the court to read the evidence and the entire charge which the trial court gave to the jury from which it will be observed that the only basis on which the jury could find the appellant guilty would be based upon speculation and conjecture, and certainly the jury were not warranted, under the evidence, to find the appellant guilty beyond a reasonable doubt. On this basis, the trial court should have granted appellant's Motion for a Judgment of Acquittal and for Arrest of Judgment.

11. The jury was tampered with and failed to follow the instructions of the Court not to view television programs having to do with the instant case.

The trial court properly instructed the jurors various times during the trial that the jurors would refrain from watching television shows (among other things) having to do with the trial of this case. The record discloses that Juror May, the foreman of the jury, was made the subject matter of a nationwide television broadcast during the trial of this case (App. 30a); that Juror May was scrutinized on said program through his next door neighbor and through the pastor of his church as to "What kind of a man is Mr. May." The court can take judicial notice of the fact that during the trial of this case, a heated debate was in progress in the United States Senate on the so-called "civil rights bill" and great public interest was generated over the issue "Will a Southern Jury convict." It was established by the testimony of Juror May (App. 31a) that he went to the home of his next door neighbor and viewed that television broadcast from start to finish (App. 33a). He conceded that the questions were asked of his next door neighbor and of his pastor as to what kind of a man Mr. May was (App. 35a) and questions going to his qualities as a juror in this case (App. 32a-33a). The testimony of a disinterested witness shows that the subject matter of this telecast was "Will a southern jury convict" and that Mr. May's pastor was an integrationist. (See page 122, Transcript on Motion for a New Trial.) An affidavit by a member of the Bar was attached to appellant's Motion for a New Trial in which affidavit the affiant stated that (App. 26a):

> "It appeared obvious to me that the foregoing broadcast was intended to exercise a subtle form of coercion upon the minds of the jurors trying the

> above entitled case and that it was apparently designed to focus the attention of the public on the jurors themselves and away from the issues and the defendants in the trial, thereby placing the jurors themselves on trial in the eyes of the viewing public."

In said affidavit, the affiant states that "the theme of the television broadcast was 'Can a Southern jury be depended on to convict in a civil rights case' ". When these factors are considered in the light of the discussion relating to point 14 of this appeal, it appears clear that the appellant was deprived of a fair and impartial trial before a fair and impartial jury, particularly since Mr. May was the foreman of the jury and of course presided over and influenced its deliberations.

Appellant's counsel did not know until after the trial that Juror May witnessed the objectionable television broadcast and the record shows that said juror did not disclose this occurrence during the trial, so there was no opportunity to replace him with one of the alternate jurors. In the case of *Remmer* v. *United States,* 347 U. S. 277, 74 S. Ct. 450, the court said:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the juror is, for obvious reasons, deemed presumptively prejudicial if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Citing *Mattox* v. *United States,* 146 U. S. 140, 148-

150, 13 S. Ct. 50 52-535, 36 L. Ed. 917; *Wheaton* v. *United States*, 8 Cir. 133, F. 2d 522, 527.

Although Juror May denied that this program prejudiced him against the defendants, (which is self-serving) that certainly does not overcome the presumptive prejudice. His conduct was all the more reprehensible because, according to his own testimony, he stated that the occurrence disturbed him because of the instructions of the trial court to the jurors not to witness television broadcasts dealing with the trial (App. 36a). That is all the more reason why he should not have concealed the occurrance but have made a disclosure to the court at the time, which would have afforded defense counsel the right to replace him. The fact that he was foreman of the jury is most significant and adds weight to the position taken by appellant. See also the second case of *Remmer* v. *United States*, 350 U. S. 377, 76 S. Ct. 425, and *Gold* v. *United States*, 352 U. S. 985, 77 S. Ct. 378.

12. The court erred in screening the F.B.I. files pertaining to witnesses who testified for the government in this case and failing to make available to counsel all of the statements which said witnesses made to the F.B.I.

13. The court erred in making government witnesses' statements to the F.B.I. available to counsel only after the witness had testified.

Since points 12 and 13 are so interrelated, they will be discussed together. The record in this case shows that the trial judge overruled appellant's Motion to Produce Government Documents, (App. 21a) the object of the Motion, of course, being that appellant's counsel wanted to inspect the statements prior to trial in order to prepare his defense. The record shows this Motion was denied and that the trial court instead made avail-

able to counsel for appellant certain portions of the statement which the witness gave the F.B.I. only after the party was called as a witness. It is submitted that the action of the trial court in this respect was in direct conflict with the case of *Jencks* v. *United States*, 353 U. S. 657, 77 S. Ct. 1007. Also, the trial court screened the statements made by the witness to the F.B.I. to decide what portions of the witness' statement would be made available to counsel. The *Jencks* case unequivocally held that this was improper. At 353 U. S. 668, the Court said

> We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense because only the defense is adequately equipped to determine the effective use for purpose of discrediting the government's witness and thereby furthering the accused's defense. The defense must initially be entitled to see them to determine what use may be made of them. Justice required no less.

The record will show that there was a battery of attorneys representing the defendants, and since only one copy of the F.B.I. report was made available to counsel, this court can further understand the utter dilemma faced by counsel under the procedure followed, and the inability of counsel to effectively prepare the defense and cross-examine government witnesses under such conditions.

14. The court erred in instructing the jury that Reverend Turner's action was a "good deed" in the face of appellant's position during the trial that it was a "bad deed."

In the court's charge to the jury, the court stated that the activity of Reverend Turner in escorting the negro students to school was a well intended contribution

(App. 25a), and a good deed, whereas appellant's position was that his activities on this occasion constituted a violation of the injunction (App. 22a). Turner's activities unquestionably formed the hub of this proceeding and when the court charged the jury that his activity was a well-intentioned contribution, this action on the part of the trial judge rendered ineffective the jury trial, particularly when considered in the light of other aspects relating to the jury outlined in this brief. This was a question for the jury to decide, and when the court usurped the power of the jury on this crucial issue, the appellant was effectively deprived of a jury trial in the sense and meaning the courts guarantee an accused a fair and impartial trial by jury. It would serve no useful function in this brief to outline cases supporting appellant's right to trial by a fair and impartial jury, and appellant submits that the court's action in this respect deprived appellant of a trial by a fair and impartial jury, particularly when considered in the light of the discussion of point 11 in this appeal. See *Patton* v. *United States*, 281 U. S. 276; *Callon* v. *Wilson*, 127 U. S. 540, and *Crawford* v. *United States*, 212 U. S. 183.

The pretended corrective statements the Court made to the jury (after counsel registered complaint) were anemic and ineffective to undo the damage because the Court had by then given this jury his evaluation of Turner's activity. It was clearly a usurpation of the jury function.

15. The Court erred in distributing to the jurors in this case the "Handbook for Jurors" which prejudiced the jurors against the appellant, depriving him of a fair and impartial trial.

The record will disclose that counsel for appellant raised this point for the first time in his Motion for a New Trial (App. 29a). It was stipulated at the time of hearings on the Motion for a New Trial (App. 36a) that counsel were not aware of the distribution of this handbook to the jurors at the time of the trial of this case; however, since counsel were diligent in bringing this to the attention of the Court as soon as it was ascertained, appellant should not be precluded from having the benefit of review in this court because the matter was fully argued in the trial court. This situation would be analogous to the rule regarding "newly discovered evidence."

The first decision in the case of *United States* v. *Gordon*, (7 Cir.) No. 11929, decided July 16, 1957, is directly in point. In that case the court rendered an exhaustive and scholarly opinion which the appellant urges this Court to read in its entirety because the point is so clearly presented. The court reluctantly reached this decision, and understandably so, because of the distinguished members of the federal judiciary who authored the handbook, which constitutes a compelling reason for following that case. Appellant believes that one paragraph from that opinion, quoted below, is sufficient to sustain appellant's position here:

> "'While, as noted, we think the distribution of the handbook was prejudicial to defendant, a more important objection is that its use constituted an impingement upon the jury system, as well as an invasion of the prerogatives of the legislative branch of the government charged with the responsibility of providing qualifications for jurors.

This, Congress has done. See Title 28, U.S.C.A. Sec. 1861, *et seq.*" A divided Court later reversed this decision on a Petition for Re-Hearing.

16. The appellant was denied a speedy trial as guaranteed under Amendment VI of the United States Constitution.

The record dicloses that the Amended Order for Attachment was issued February 25, 1957, and that on April 1, 1957, appellant filed a Demand for A Speedy Jury Trial (App. 19a), (shortly after appellant's arrest) said motion being predicated upon the Sixth Amendment to the federal constitution. Appellant says that he was denied a speedy trial under this provision of the Constitution because the trial did not begin until July 8, 1957 (App. 19a-27a). Appellant would like to point out in this connection that the Order for Attachment of the other defendants (appellants) was issued on December 5, 1956, and the appellant was not a party to that proceeding which charged the defendants named therein with criminal contempt, whereas the appellant was made a party to the Amended Order for Attachment issued almost three months later and said Amended Order for Attachment is based upon conspiracy to commit criminal contempt. Appellant would also like to point out that in his first appeal, *Kasper* v. *Brittain*, 245 F. 2d 92 (6th Cir., 1957), cert. denied, 355 U. S. 834, he was denied a 24-hour continuance on the hearing on the Petition for a Temporary Restraining Order, so if the Order for Attachment against the other defendants, entered on December 5, 1956, had been treated with the same dispatch, appellant would not now be before this court.

The courts have held that it is not necessary and, indeed, is not always possible for a defendant to delineate the rights and privileges which have been violated by the denial of a speedy trial. *Cf. Beavers* v. *Haubert*, 198 U. S. 77.

17. The Court did not have jurisdiction over the other alleged co-conspirators, by reason of which the conviction of appellant can not stand.

The record shows that the other defendants in this case were not parties to the proceedings in any manner whatsoever at the time the permanent injunction was issued. Since criminal contempt of court is uniformly regarded in the law as a crime, the courts have, so far as appellant knows, taken the position that constructive knowledge has no place in the criminal law. See *Kelton* v. *United States*, 294 F. 491; *In re Kwelman*, 31 F. Supp. 23. The cases of *Pettibone* v. *United States*, 148 U. S. 197, 206-207; the dissenting opinion in the case of *United States* v. *Hall*, 198 F. 2d 726, and the dissenting opinion in the case of *Greene et al.* v. *United States*, (not yet reported) decided on March 31, 1958, No. 100, contain pertinent statements in this respect. *Cf. Bridges* v. *California*, 314 U. S. 252, 263-268.

If the conviction of the other defendants cannot stand, then appellants conv tion cannot stand, as a mater of law.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Of Counsel:

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APPENDIX.

APPENDIX

Cause Argued and Submitted

October 16, 1958

Before: ALLEN and MILLER, Circuit Judges, and THORNTON, District Judge.

This cause is argued by J. Benjamin Simmons for appellant and by Joseph M. F. Ryan, Jr. for appellee and is submitted to the court.

Judgment

(Filed February 27, 1959)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

(Filed Feb. 27, 1959)

Nos. 13,512-13,513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division

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No. 13,512

ALONZO BULLOCK, WILLIAM A. BRAKEBILL, LAWRENCE J. BRANTLEY, CLYDE A. COOK, MARY NELL CURRIER, and WILLARD H. TILL, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 13,513

FREDERICK JOHN KASPER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Decided February 27, 1959

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and THORNTON, District Judge.

ALLEN, Chief Judge. These appeals grew out of proceedings charging appellants and others with criminal contempt under Title 18, U. S. C., Section 401 (3). The contempt proceedings were heard as one case in the District Court, severance having been denied. The appeals were argued separately before this court on behalf of appellants Bullock, et al., hereinafter called Bullock (Appeal No. 13,512), and by appellant Kasper (Appeal No. 13,513).

Many questions raised by Bullock and by Kasper are identical and will be discussed in general without designation of particular parties. A motion for judgment of acquittal was made by all defendants and denied and the case was submitted to the jury. Four of the persons charged were acquitted; but the jury found defendants Bullock, Brantley, Brakebill, Cook, Currier, Till and Kasper guilty of criminal contempt under Title 18, U. S. C., Section 403 (1). The District Court entered a judgment sentencing all appellants for criminal contempt of court.

The court held that appellants had violated an order of the District Court issued January 4, 1956, in *McSwain v. County Board of Education of Anderson County, Tennessee*, 138 Fed. Supp. 570, requiring the discontinuance of racial segregation in Clinton High School, Clinton, Anderson County, Tennessee, by the fall term of 1956. Pursuant to this order such integration was put into effect by the school executives and teachers. Twelve negroes were enrolled in a school having approximately 800 white pupils.

August 26, 1956, Kasper came to Clinton, and thereafter tried to induce various persons to oppose the obedience of the school officials to the order, and threatened to have the principal of the school ousted. Kasper took other steps aimed at preventing the effectiveness of integration and achieving the restoration of segregation in the high school; helping to set up widespread organizations for this purpose among the citizens and the high school students.

On the petition of D. J. Brittain, Jr., principal of the high school, and others, the court on August 29, 1956, issued a temporary restraining order against one John Kasper and others, enjoining them, "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them * * * from further hindering, obstructing, or in anywise interfering with the carrying out of the aforesaid order of this Court [the integration order of the court issued January 4, 1956], or

from picketing Clinton High School, either by words or acts or otherwise." None of the appellants in the Bullock group were named in this order. The temporary restraining order was personally served on Kasper on August 29. Thereafter, a preliminary injunction issued upon hearing and after further hearing by the District Court the injunction was made permanent on September 6, 1956.

On December 5, 1956, the United States Attorney filed a petition charging the Bullock group and others with criminal contempt for violating the injunction and on that date an order of attachment was issued by the court describing in detail certain alleged acts of criminal contempt and ordering that the persons named be apprehended and tried.

On February 25, 1957, the court ex parte issued an amended order of attachment stating that the present appellants and others had actual notice of the permanent injunction of September 6, 1956, and that the present appellants and others had, during the months of November and December, 1956, "entered into an agreement or agreements to violate and to cause others to violate" the injunction, and that these appellants and others in active concert and participation with Frederick John Kasper had violated the permanent injunction in respects set out in the amended order. Under this amended order Gates and Kasper were arrested and given bail. The trial started July 8, 1957. The overt acts referred to in the amended order of attachment were not the same as the acts charged in the original attachment order. It was charged in the amended order of attachment (1) on or about November 27, 28, 29, 30, and December 3 and 4, 1956, appellants and others congregated in a threatening manner along the route to the Clinton High School taken by negro students and intimidated them from attending Clinton High School. Charge 2 was dropped because John Gates died before the trial. It was charged (3) on December 4, 1956, when Rev.

Paul Turner escorted the negro students to the school, he was vilified, attacked and badly beaten by appellants.

Evidence as to the following facts was shown at the trials. For a number of days in September and for several days in the latter part of November, 1956, all local newspapers and radio and television stations gave great publicity to the temporary restraining order issued by the District Court on August 29, 1956. These broadcasts and newspaper articles made it plain that the injunction prohibited interference with the integration of Clinton High School and the picketing of Clinton High School.

During the week following August 27, 1956, there had been considerable disturbance outside the high school. Enrollment dropped greatly but thereafter, until the end of November, the problems subsided and attendance rose. On November 27 or 28 appellants Brakebill, Brantley and Bullock stationed themselves at the street intersection which the negro children had to pass to reach the high school. Appellants remained until 8:30, the opening hour for school, or until 8:45 a.m. This surveillance was repeated every day for the remainder of the week. The negro children did not come to school. On Monday, December 3, appellants appeared again at the same place. Cook and Bullock made abusive remarks about Rev. Turner, the integrationist who planned to accompany the negro children to the school. Rev. Bullock stated that if the negro children were not taken out of the school someone would get killed.

On Tuesday, December 4, many cars were parked in the area of the road leading from the negro section to the school. Bullock, Cook and Rev. Turner were present. Cook told Rev. Turner that they wouldn't let him get away with escorting the negro children to the school. The chief of police asked Bullock to leave before there was trouble, but Bullock refused, stating, "You want me to leave so that you can bring these colored children down here to school."

Bullock said that he was up there "to keep us 'nigger lovers' from taking those 'niggers' to school" and that he would keep the white school white and there would be trouble. Later the same morning Rev. Turner and two other men escorted the negro children through the crowd to the school. Brakebill, Cook and Currier made threatening statements to the negro children and to the men escorting them and followed Turner and the children down the hill, obscene remarks being made. After Turner had escorted the negro children to the school and come back there was more abusive language from Brakebill, Bullock and Currier. Turner walked on and Cook attacked him. Turner backed away but was followed and Cook struck Turner, who was unarmed. Turner pushed his way through the crowd to an automobile and was pounded against the fender. Turner fell on his knees and his head was pushed against the fender while the crowd yelled "Kill him." The police came and arrested Cook.

Appellants did not deny this testimony. They introduced evidence that while they were opposed to integration they were seeking legal means to do away with it; that the members of the White Citizens Council, organized during this general period, did not believe in violence; that there was no trouble until the Rev. Turner decided to bring the negro children to school.

The District Court found that Kasper had actual notice of the permanent injunction of September 6, 1956. Kasper also had received personal notice of the temporary restraining order of August 29, 1956, which was served on him by the United States Marshall. Kasper took the order from the Marshall after a portion of it was read to him, stating "I know what it is. It is an injunction prohibiting me from interfering here in this school business." Kasper had previously been found guilty of contempt of court for inciting the citizens of Clinton and of Anderson County in a speech he made on August 29, 1956, to violate the

restraining order. *Kasper v. Brittain*, 245 Fed. (2d) 92 (C. A. 6), certiorari denied 355 U. S. 834.

Kasper was active in forming the White Citizens Council in Clinton and the Tennessee White Youth. He was the consultant on all questions of framing charters and in general gave advice and counsel to the groups which met at Ann's Cafe and the Southland Cafe in Clinton. Kasper was seen meeting with the students of the Clinton High School. Testimony was given as to frequent meetings in a room of the Southland Cafe. The charter of the White Citizens Council was taken out by several citizens of Clinton, including John Kasper. Kasper issued a press release in connection with the formation of Tennessee White Youth. He paid to have the charter notarized and drove around the county with those active in the formation of this group.

Kasper also directly took part in inciting individual citizens to violate the order of the court. As testified by Mr. D. J. Brittain, the principal of the High School, Kasper had the following conversation with him:

> Q. What did he say?
>
> A. Well, Mr. Kasper asked me what I was going to do in regard to getting the Negroes out of Clinton High School. And I told him I could not do anything as we were under a court order to accept these Negroes in Clinton High School.
>
> Q. Was there anything else said between you and him?
>
> A. Yes. He stated to me that other people other places had not accepted these people. I told him that I was under the impression that these people were not under a court order as we were.
>
> * * * * * * *
>
> A. Well, there was more discussion. There was several people there that asked question and made com-

ments, and Mr. Kasper then said, "Let's get back to this issue." He said, "What are you going to do?" And I told him that I had only three courses. One was to obey the law, second disobey the law; third, resign my job, and that I intended to obey the law.

* * * he finally said that they would get me out of the school before the year was over * * *.

Similar testimony was given by James Leo Burnett, who said in answer to questions put to him:

A. John Kasper came to my home the latter part of August. I expect it was the first day he was in town. And asked me to join in his program of ousting the Negroes from Clinton High School.

Q. Where did you have that conversation with him?

A. In my back yard.

Q. At your home?

A. Yes, sir.

Q. Was that before or after school had started?

A. That was before school started.

Both Kasper and the Bullork group urged that the verdict was not supported by the evidence. The recital of the above facts requires the contrary conclusion.

A motion for severance was made by Bullock on the ground that for the Bullock group to be tried with Kasper would greatly prejudice the Bullock case. The denial of this motion by the court is assigned as reversible error. In ruling on questions of severance the District Court is vested with a wide discretion. Fed. Rules Cr. Proc. rule 14, 18 U. S. C. Such refusal is not assignable as error unless abuse of discretion is affirmatively shown. *Stilson* v. *United States*, 250 U. S. 583. In view of the close connection between Kasper and the members of the Bullock group who participated in acts of violence committed December 4, 1956, in an effort to hinder and destroy obedience to the lawful order of the court, we conclude that the discretion of the court was not abused.

Appellants contend that the District Court erred in issuing the injunction for the reason that Rule 17 of the Federal Rules of Civil Procedure was violated. They assert this because of the alleged fact that the action seeking an injunction was not prosecuted in the name of the real parties in interest.

The petition for prosecution for criminal contempt due to the violation of the permanent injunction order of September 6, 1956, was filed by the United States Attorney December 5, 1956. The first order for attachment was based upon this petition. However, the petition of August 29, 1956, praying for a temporary restraining order, was filed by the principal of Clinton High School, a member of the Board of Education of Anderson County, the Assistant Attorney General for the 19th Judicial Circuit for the State of Tennessee, and two attorneys who had been connected with the desegregation litigation of Clinton High School. These persons sought the protection of the court for the High School in their concern for the maintenance of "respect for the laws of Tennessee and the United States and respect for the District Court and the Supreme Court of the United States. * * *."

We think the Federal Rules of Civil Procedure, including rule 17, have no application to a criminal contempt action which is instituted by notice under rule 42 (b) of the Federal Rules of Criminal Procedure, Title 18. The rules governing criminal contempt are found in this rule 42, Federal Rules of Criminal Procedure, sub-section (b) of which reads as follows:

> "(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such.

The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

The provisions for arrest, bail and punishment have more of a criminal than a civil character. Since the action is punitive and sentence is imposed for the purpose of vindicating the authority of the court, *United States* v. *United Mine Workers of America*, 330 U. S. 258, the public has an interest in the controversy. The public interest of the parties who sought the temporary restraining order was held in *McSwain* v. *County Board of Education of Anderson County, Tennessee, supra*, to be sufficient to permit them to seek injunctive relief. The District Court stated in the first Kasper case (*Kasper* v. *Brittain*) that in criminal contempt it was "only necessary for some reputable party or parties to make known to the Court that a prima facie case exists that the Court's order is being violated." Inasmuch as this court upheld the conviction on appeal this point has been adjudicated. Also, appellants, not having appealed from the order of the injunction, have waived the right to attack the court's jurisdiction in a criminal contempt proceeding. *Jennings* v. *United States*, 264 Fed. 399 (C. A. 8).

The further contention that the injunction of August 29, 1956, is invalid under Federal Rule of Civil Procedure 65 because there was no showing of immediate and irrepar-

able injury in the petition for the temporary restraining order also is without merit. This order was issued without notice to Kasper and certain other named persons. However, it was alleged in substance in the petition that immediate and irreparable injury would be sustained by the school and Anderson County if the actions of the defendants were not restrained. The temporary restraining order in its terms specifically complied with the provisions of rule 65, whether or not the Rules of Civil Procedure be considered applicable here. The petition described picketing at the school with large and threatening crowds continuously keeping students from the school, an attack being made upon a negro child. This constitutes in effect an allegation of immediate and irreparable injury. A full hearing was had with respect to the permanent injunction. Even if the injunction was invalid, appellant was chargeable with criminal contempt for violating it, for the order of the District Court was in full force and effect until set aside in an orderly way. *United States* v. *United Mine Workers of America, supra*, 290, 291, 292.

The District Court had jurisdiction to issue the injunction. Title 28, U. S. C., Section 1651. As pointed out by Chief Judge Simons in *Kasper* v. *Brittain, supra*, it would seem that the case of *Brown* v. *Board of Education*, 349 U. S. 294, its associated cases, and the judgment of this court in *McSwain* v. *County Board of Education of Anderson County, Tennessee, supra*, constitute a conclusive response to appellants' contentions on this point. As the Supreme Court stated in *Brown* v. *Board of Education, supra:*

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."

Brewer v. *Hoxie School District No. 46 of Lawrence County, Arkansas*, 238 Fed. (2d) 91, 98 (C. A. 8), in a full review of the question declared:

> "* * * jurisdiction of the federal courts to issue injunction to protect rights safeguarded by the Constitution is well established. See * * * *Bell* v. *Hood, supra*, 327 U. S. at page 684, * * * 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' An injunction will issue wherever necessary 'to afford adequate protection of constitutional rights,' *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95, * * *. Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available."

To the same effect see *Kasper* v. *Brittain, supra.*

All appellants contend that it was reversible error to substitute for the order of attachment issued December 5, 1956, the amended order issued February 25, 1957. They urge that the amended attachment order changed the original proceedings from one arising out of a civil suit to a prosecution for criminal conspiracy by the United States against individuals not originally named and others. This contention in material points is not correct. The original petition filed August 29, 1956, prayed for injunctive relief against the picketing of the high school and also asked the court to issue show cause orders why Kasper and five others should not be held in contempt of the orders of the court. The amended order did not allege violation of the

conspiracy statute, Title 18, U. S. C., Section 371, but charged criminal contempt.

Rule 42 of the Federal Rules of Criminal Procedure provides that criminal contempt actions are initiated neither by indictment nor by information, but by simple notice. The requirements of the section are less strict and technical than those of the statutes under which criminal causes are instituted. The contempt proceeding is summary in character and technical pleadings are not required. *MacNeil* v. *United States*, 236 Fed. (2d) 149 (C.A. 1), certiorari denied 352 U. S. 912. See also *United States* v. *United Mine Workers of America*, *supra*, 296-7. In that case the contempt described in the petition was not denominated "criminal as required by the rule." Defendants urged that the omission of the words "criminal contempt" from the petition and rule to show cause was prejudicial error. The Supreme Court held that Rule 42 (b) "requires no such rigorous application" and stated, "Its purpose was sufficiently fulfilled here * * *."

Decisions involving requirements for the framing or amending of indictments are not applicable. We therefore do not discuss many authorities relied on by appellants.

Appellants contend that the second attachment order violated Rule 7 (e) of the Federal Rules of Criminal Procedure which provides that the court may permit an information to be amended at any time before the verdict if no additional offense is charged and if substantial rights of the defendant are not prejudiced.

No rights of the appellants were violated by the issuance of the second attachment. The original attachment and the amended attachment each charged the same offense, namely, criminal contempt. The temporary restraining order of August 29, 1956, enjoining and restricting John Kasper and others from hindering, obstructing, or in anywise interfering with the carrying out of the integration order of January 4, 1956, was addressed not only

to the agents, servants, representatives and attorneys of Kasper and others, but to "all other persons who are acting or who may act in concert with them * * *." The addition in the amended order for attachment of an allegation of an agreement to violate and cause others to violate the injunction in active concert and participation with Frederick John Kasper fell within the terms of the temporary restraining order of August 29, 1956, made permanent on September 6, 1956. The essence of the charge in both attachment orders was that appellants had violated the injunction of the District Court. No additional offense was charged. Appellants were cited both in the original order and the amended order. Kasper, the only appellant added by the amendment, makes no objection on this point.

Neither were appellants prejudiced by the amendment. While the overt acts charged in the original attachment were previous to and hence different from those charged in the amended order, appellants had ample notice of all acts charged and full understanding of what they were. Cf. *United States* v. *United Mine Workers of America, supra,* 296 297. The amended order was issued on February 25, 1957. The trial started on July 8, 1957, and appellants had ample opportunity to prepare for hearing.

The fact that Kasper's application for a bill of particulars was refused is not material. The charge was specific and detailed. Kasper was not entitled to be given details of the government's evidence to be presented at the trial. *The Kansas City Star Company* v. *United States,* 240 Fed. (2d) 643 (C. A. 8).

It is urged that reversible error existed because before the hearing appellants requested the production of all statments and other matter bearing on the testimony which might be given by Government witnesses. This request was renewed at the trial. The court ruled that appellants would be entitled to receive statements of a witness produced by the Government only after the witness had testified. Also the court deleted portions of certain

statements which it considered not relevant. Relying on *Jencks* v. *United States*, 353 U. S. 657, appellants contend that the pre-trial production of all statements given to the FBI in the case is required. On the contrary, the *Jencks* opinion points out that the petitioner was entitled to an order directing the production of statements "touching the events and activities" as to which certain witnesses "testified at the trial."

The statute, 18 U. S. C., Section 3500, enacted shortly after the announcement of the *Jencks* case, expressly prohibits pre-trial discovery of such reports. It is significant that the Senate Report upon the Bill, No. 981, 85th Congress, 1st Session, Appendix p. 8, states that the provision prohibiting pre-trial disclosure was inserted to avoid the misinterpretation of *Jencks* v. *United States* which had occurred in some court decisions, a matter which was surprising to the Committee, particularly when the "overwhelming judicial thought * * * [is that *Jencks*] does not apply to pre-trial production." Pre-trial discovery of such material has been denied in numerous district court cases subsequent to the *Jencks* case.

The Government's appendix shows that the court complied fully with the principle of *Jencks* v. *United States*. In fact, it presents many instances in which material asked for from a particular witness was placed at the disposal of appellants' attorney at the opening of the examination. Since such reports must be of the events and activities related in the testimony, *Jencks* v. *United States*, *supra*, clearly the trial court must determine whether the statement or portions thereof touch upon such events and activities. It was not error for the District Court to screen the reports to determine whether some part of them was irrelevant and immaterial.

Various prejudicial errors are claimed to exist in the charge. With reference to the attack on Rev. Turner the court characterized Rev. Turner's act in conducting the

negro children to the high school as a "well-intentioned contribution" and as a "good deed." Appellants say this was an invasion of the province of the jury. Whatever influence these words might have had against appellants was wiped out by the later charge of the court that "From the standpoint of segregation it might not be considered a well-intentioned contribution." The court properly left it to the jury to determine what Rev. Turner's intention was.

It is also contended that the District Court did not adequately charge the jury that the prosecution must prove beyond a reasonable doubt the agreement or agreements between appellants.

The court instructed the jury that before it could convict it must find three facts:

(1) That appellants had notice of the injunction.

(2) That appellants committed acts in violation of the injunction in concert with Kasper.

(3) That these acts had the effect of hindering or obstructing the integration of the Clinton High School in violation of the injunction.

Under the charge the jury was required to be convinced beyond a reasonable doubt of the existence of each of these elements of the offense before it could convict. Read as a whole the charge is fair and accurate.

Also, appellants claim that the refusal of the court to charge that the failure of the Government to subpoena any of the negro high school children raised a presumption that their testimony would be unfavorable to the Government. The refusal was not erroneous. It was not shown to be peculiarly within the power of the Government to produce the witnesses. It is only when this fact appears that the presumption arises. *McGuire* v. *United States*, 171 Fed. (2d) 136 (C. A. D. C.). As the witnesses were

equally available to both parties, the court did not err in refusing the instruction. *Shurman* v. *United States*, 233 Fed. (2d) 272 (C. A. 5).

Appellants also say it was reversible error for the lower court to allow the court clerk to issue to each member of the jury panel a publication entitled "Handbook for Jurors serving in the United States District Courts." This contention relies upon *People* v. *Weatherford*, 160 Pac. (2d) 210; *The People* v. *Schoos*, 399 Ill. 527, and *United States of America* v. *Gordon* (C. A. 7), No. 11,929, opinion on July 16, 1957. In the latter case the judge of the District Court had distributed the same pamphlet given out by the court in the case at bar and this was held to be reversible error. However, in *United States* v. *Gordon*, 253 Fed. (2d) 177 (C. A. 7), a case heard by the court en banc, the former opinion issued July 16, 1957, was superseded and withdrawn. The Court of Appeals said that, assuming the entire panel read the handbook and that the handbook contained statements inimical to a defendant in a criminal case, the defendant had the right of challenge to the polls. Failure to make the objection on the *voir dire* examination, the court held, constitutes a waiver, for jurors cannot be challenged for bias by a motion for new trial. *Frazier* v. *United States*, 335 U. S. 497. Under this authority the objection was waived in the instant case, for no objection was made on the *voir dire* examination.

Also, we hold that the District Court did not err in distributing this handbook. It was a pamphlet for the instruction of jurors authorized by the National Judicial Conference, composed of the chief judges of all the circuits, and framed by a committee of highly distinguished jurists. It was not shown that the pamphlet contained anything prejudicial to appellants. We agree with Chief Judge Ducy of the Second Circuit, who stated in *United States* v. *Gordon*, *supra*, 186, that the theory of the handbook was that "an informed juror who understood something of the proper functions of a juror could do a better

and more intelligent job than one who went into the jury box with a blank mind and with none but the vaguest ideas of where a juror fitted into the federal judicial picture."

This court gave extensive consideration to the question of using the Handbook for Jurors in *Horton* v. *United States* and *Johnson* v. *United States*, companion cases reviewed in 256 Fed. (2d) 138 (C. A. 6). Contentions similar to those made herein were raised in the *Horton* case, *supra*, namely, that the use of the handbook is an encroachment upon the jury system and denies appellants a fair and impartial trial. Chief Judge Simons, speaking for the court, said:

> "The challenged language of the handbook, read in context, instructs the jurors that the Judge determines the law to be applied while the jury decides the facts, that the judge declares the law to be and his law controls, that the jury must determine what are the true facts and the jurors are sworn to disregard prejudices and follow the court's instructions and they violate their oath if they render their decision on the basis of the effect their verdict might have in other situations. To say that the challenged statement impinged upon the independent judgment of the jurors would denigrate the intelligence of Federal jurors, impute lack of conscience to them, and defiance of judicial instructions and open the doors to innumerable appeals and petitions of guilty defendants tried by juries which had received the handbook. Upon such thin assumptions as are here advanced, this ought not to be done."

See also *People* v. *Lopez*, 32 Cal. (2d) 673; *United States* v. *Allied Stevedoring Corporation*, 258 Fed. (2d) 104, 106, 107 (C. A. 2).

Various constitutional questions are raised by appellant Kasper which require little discussion. Kasper claims that

the injunction issued by the District Court violates the free speech provision of the First Amendment to the Constitution. As held in *Kasper* v. *Brittain, supra*, the right to speak is not absolute. The First Amendment does not confer the right to persuade others to violate the law, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502.

Neither was Kasper twice put in jeopardy by his second conviction of criminal contempt. The first finding of guilty grew out of Kasper's individual contempt committed on August 29, 1956. *Kasper* v. *Brittain, supra.* The present conviction grew out of a separate and subsequent contempt, consisting of Kasper's acting in concert with others to violate the permanent injunction issued September 6, 1956. The jury evidently found that it was Kasper's continuing purpose, as he declared, to stay in Anderson County, Tennessee, until the negroes were thrown out or put out. The jury was entitled to consider that Kasper's activities subsequent to August 31, 1956, were directed, in concert with other defendants convicted, to the achievement of this purpose.

Under the Constitution Kasper is not immune from prosecution for contempt of court committed in November and December, 1956, simply because he was found guilty of a similar contempt which occurred in August, 1956. Successive and separate contempts are punishable as separate offenses. *Jennings* v. *United States, supra.* Cf. *Tobin* v. *Pielet*, 186 Fed. (2d) 886 (C. A. 7).

Kasper also urges that he was denied the right to a speedy trial guaranteed by the Sixth Amendment because four months passed from the time the amended order of attachment issued to the time of trial. The right to a speedy trial is necessarily relative. *Beavers* v. *Haubert*, U. S. 77. The Sixth Amendment does not guarantee an immediate trial. No prejudice and no features of arbitrary, oppressive or vexatious delay were shown. Cf. *Chinn* v. *United States*, 228 Fed. (2d) 151 (C. A. 4).

Furthermore Kasper contends that he was denied due process of law under the Fifth and Sixth Amendments upon the ground that the Attorney General and the Director of the Bureau of Prisons refused to transfer him from a Federal prison in Florida to a prison in or near Washington, D. C. Kasper's attorney was located in Washington and Kasper claims that this denial of transfer deprived him of effective assistance of counsel. This objection is overruled. The record shows that Kasper was effectively assisted by counsel. Also, nothing in the Constitution guarantees a prisoner serving a lawful sentence the right to be transported to another locality to be near his attorney on appeal.

A further question presented on this appeal is the contention that the jury was tampered with by employees of a broadcasting company producing a network television program while the trial was in progress in which the foreman of the jury, Mr. Powell May, was directly involved. The facts are developed on motion for new trial which was denied by the trial court. The court had instructed the jury not to view television programs, read the papers or listen to radio accounts of the case. May was invited by his next door neighbor, Mrs. Ray Carroll Jones, to come to her house and view a television broadcast in which Mr. Jones was to be shown. It does not appear that May was told the subject of the program. When questioned about the invitation May said, "I want to explain that we have no television receiver and [are] not particularly interested in television shows and knew nothing about the preparation of this particular program.

* * * We did not know who it concerned * * *." These statements are not contradicted.

There is no evidence that the network secured or tried to get May's presence for the broadcast. While May failed to follow the court's instructions, there is no evidence of an intention, either upon the part of the network or of Mr. and Mrs. Jones, to influence May in the case.

Defendants claim that the subject of the broadcast was "Will a Southern Jury Convict?" A woman testified that she viewed the telecast, that the announcer said that "a Southern jury wouldn't convict anyone," and that May was identified as being on the jury.

This woman did not listen to the telecast at the home of Jones. It is undisputed that May came into the Jones home after the particular telecast had begun. May repeatedly declared under oath that the phrase "Will a Southern Jury Convict?" was not used and that that subject was not the theme of the broadcast. The fact that he went to the Jones home after the announcer had begun supports May's statement, for he well could have missed the announcement of a general theme, if any. What May saw on the screen was his next door neighbor Jones and the pastor of May's church being interviewed. The subject seemed to be May as an individual. May testified that no mention of the trial proceedings was made. Both Jones and May's pastor bore witness to May's high character and integrity. Each in effect stated that he believed May would render an honest decision in a trial.

Defendants urge that under these circumstances *Remmer* v. *United States*, 350 U. S. 377, holds that a presumption of prejudice exists and requires the conclusion that reversible error was established. In the *Remmer* case, *supra*, 380, it was shown that a private party had suggested to a juror that the defendant (one Bones Remmer) had "sold Cal-Neva for $850,000 and really got about $300,000 under the table which he daresn't touch. Why don't you make a deal with him?" The juror vigorously stated that he could not talk about the case. The court consulted with the District attorney and the FBI investigated the matter, but defendant and his counsel were not apprised of the investigation. The juror was deeply distressed by the incident and stated to another juror after the trial that he had "been under a terrific pressure." The Supreme Court held that the juror had been "sub-

jected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard zealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized instrusions purposefully made," and held that petitioner was entitled to a new trial.

On the facts presented the *Remmer* case is plainly distinguishable from the instant case.

May was not approached with reference to the instant case. A neighborly invitation brought May over to the Jones house. Moreover, it is questionable whether the rule of the *Remmer* case is applicable to a public broadcast. The *Remmer* case presented a situation of proven tampering by private parties. Here no tampering is proved. The situation here presented arises in many instances where, as here, the jury is not confined for the duration of the trial. As Mr. Justice Holmes, speaking for the Supreme Court, declared in *Holt* v. *United States*, 218 U. S. 245, "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." Despite the admonitions of trial judges, many jurors read newspaper accounts or hear reports on radio and television concerning the trial in which they are serving. This fact does not of itself invalidate the verdict. Prejudice must be shown. Cf. *United States* v. *Catalano*, 231 Fed. (2d) 67 (C. A. 2).

Although the trial court had already charged the jury in the instant case not to view television or read or listen to accounts of the trial, it recognized the frequent destruction of complete isolation that arises through radio and television for persons sitting on the jury. The court therefore charged the jury to disregard completely any impressions or information received from other sources, such as radio, television or newspaper articles. Under Fed. Rules of Cr. Proc., rule 33, the trial judge is vested with a wide discretion in the granting of a new trial. We think that

discretion was not abused. May did not seek to view the broadcast. May's neighbor and his minister were the only persons besides the announcer who appeared on the broadcast. The neighbor was a segregationist, the minister an anti-segregationist. Each spoke in the highest terms of May's integrity and judgment. We conclude that the District Court's finding that May was not influenced by the broadcast was not clearly erroneous. It is for the judge to decide whether or not private communication is prejudicial. The same rule applies with even more force to public communication which reaches a juror without intention on the part of the broadcaster. In numerous decisions the trial judge has held that a new trial should not be had, although information that superficially appeared prejudicial was transmitted to the jury. Instances where the court held prejudice was not shown include the following: *Giunto* v. *United States*, 212 Fed. (2d) 8 (C. A. 8), certiorari denied 348 U. S. 884; *United States* v. *Allied Stevedoring Corp.*, 241 Fed. (2d) 925 (C. A. 2), certiorari denied 353 U. S. 984 (seven jurors read account of association of defendant with another man who had been indicted for the same offense); *Reining* v. *United States*, 167 Fed. (2d) 362 (C. A. 5), certiorari denied 335 U. S. 830 (newspaper account reported that defendant's accomplice was dead and that he had said he would rather take his life than face prosecution); *Miller* v. *Commonwealth of Kentucky*, 40 Fed. (2d) 820 (C. A. 6) (newspaper articles on the trial found not inaccurate and the court held there was no prejudice). See 31 A. L. R. (2d) 417.

Briggs v. *United States*, 221 Fed. (2d) 636 (C. A. 6), and *Krogmann* v. *United States*, 225 Fed. (2d) 220, 228 (C. A. 6), are not in conflict with this decision. In each of these two cases newspaper publicity unfavorable to the defendant was read by members of the jury. Here it is uncontradicted that the broadcast contained no mention of appellants and no discussion of facts tending to prove their guilt or innocence of the pending contempt charge. More-

over, the court charged the jury in forcible terms to ignore any newspaper publicity or broadcasts. No person or organization attempted to tamper with the jury. The publication was not caused by improper action of any government officer. Cf. *Shepherd* v. *Florida*, 341 U. S. 50. The ruling here was well within the range of discretion vested in the trial judge. In accord see *United States* v. *Postma*, 242 Fed. (2d) 488 (C. A. 2).

We conclude that the court's decision that May was not in any respect influenced in his verdict by reason of the television program is amply supported by the evidence.

All questions presented have been considered. We find no reversible error in the record.

The judgment is affirmed.

(Filed April 30, 1959)

No. 13,513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK JOHN KASPER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Order

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and THORNTON, District Judge.

This case came on to be heard upon the petition for rehearing filed by appellant Frederick John Kasper in Case No. 13,513.

On Consideration Whereof it is Ordered that on page 6 of the opinion lines 23, 24, 25 and 26 be and they hereby are stricken out:

It Is Further Ordered that on page 6 the last sentence of the opinion be and it hereby is stricken out in its entirety and that the following sentence be and it hereby is substituted therefor:

> In view of the close connection between Kasper and the members of the Bullock group who participated in acts of violence committed December 4, 1956, in an effort to hinder and destroy obedience to the lawful order of the court, we conclude that the discretion of the court was not abused.

It Is Further Ordered that on page 15 of the opinion lines 16, 17, 18, 19, 20 and 21 be and they hereby are stricken out in their entirety:

It Is Further Ordered that on page 15 of the opinion the sentence beginning in line 29 be and it hereby is stricken out in its entirety and that the following sentence be and it hereby is substituted therefor:

> The jury evidently found that it was Kasper's continuing purpose, as he declared, to stay in Anderson County, Tennessee, until the negroes were thrown out or put out. The jury was entitled to consider that Kasper's activities subsequent to August 31, 1956, were directed, in concert with other defendants convicted, to the achievement of this purpose.

It Is Further Ordered that the petition for rehearing be and it hereby is denied for the reasons stated in the memorandum of opinion of even date herewith.

Approved for entry:

——— E. Allen
United States Circuit Judge

(Filed April 30, 1959)

No. 13,513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK JOHN KASPER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Memorandum on Petition for Rehearing

Decided April 30, 1959

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and THORNTON, District Judge.

ALLEN, Chief Judge. Due to an ill-prepared and confusing appendix which did not use the name of Cook or any name in connection with certain statements, the opinion declared that these statements were those of Kasper. This was an error. These words were spoken by Cook.

Not all of the evidence against Kasper adduced in the second trial with reference to violation of the injunction consists of the same facts that were presented in the trial of the first contempt charge. Some of these facts were necessarily considered as background to the case but much evidence was introduced concerning Kasper's activities subsequent to his first conviction (August 31, 1956) and also to the issuance of the permanent injunction (September 6, 1956).

The jury had the whole record before it, not merely an appendix. It was entitled to infer from the facts proven that there were definite concert and conspiracy between Kasper and the other defendants convicted. For instance, when Bullock presented a petition calling for ouster of

Brittain as principal of the school, several weeks after Kasper's first conviction and after the issuance of the permanent injunction, the jury could justifiably find that Bullock was carrying out the threat made by Kasper personally to Brittain to get Brittain out of the school "before the year was over or the Negroes out * * *." There is no indication in this record that Kasper abandoned this purpose during the period in controversy.

The jury was not compelled to ignore the fact that Kasper, not shown to be a resident of Tennessee, remained in Clinton in close association with the aggressive opponents of the permanent injunction up to around December 4, 1956. The jury might rightfully conclude that Kasper's evident purpose was in concert with other defendants to continue to incite resistance to the integration order and to put out the negroes by intimidation, threats and violence. The jury knew that Kasper was in continual conference and association with the men who actually spoke the abusive words and committed the violent acts of December 4, 1956. Cook, after abuse and profanity, said to Rev. Turner, "You can't get away with this * * *. We won't let you," and physically assaulted Turner. Cook was not only the constant companion of Kasper during these three months, but the jury was entitled to find from these facts that Cook in doing these acts was carrying out Kasper's continuing purpose.

That Kasper was in the area for a long period between August and December, 1956, is proved by irrefutable evidence not denied by the witnesses. A police officer of Clinton from August through December 4, 1956, said that he had seen Kasper in town "a lot," "mostly every night" at the Southland or Ann's Cafe. He testified in detail as to the hours that he saw Kasper. Brakebill and Cook were often with him. To the question concerning the months when this happened the police officer answered, "since this trouble started around August, on up." He described

meetings that were held by the group and said that they occurred once a week from August to December 4.

Kasper did not take the stand in the instant proceeding He testified in the hearing on the contempt phase of the proceedings of August 30 and 31, 1956. The District Court in its decision [August 31, 1956] in discussing the question whether Kasper wilfully violated the injunction order, said that it was Kasper's object "stated more than once," "to get Mr. Brittain out because he was doing his duty" and that "he was going to stay in Anderson County until the Negroes were thrown out or put out." This finding was supported by the evidence. Moreover, Kasper in his testimany admitted telling a reporter that he was "going to remain there and help these fellows on the picket line to keep on organizing and distributing legal literature."

We conclude that under this record the evidence was sufficient to support a finding by the jury that Kasper was in the area around December 4.

The court adheres to its original conclusion. The petition for rehearing is denied.

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JAMES R. BROWNING

No. 966

In the Supreme Court of the United States

OCTOBER TERM, 1958

FREDERICK JOHN KASPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
W. WILSON WHITE,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 966

FREDERICK JOHN KASPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2–25) is not yet reported. The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1959. A timely petition for rehearing was denied on April 30, 1959. The petition for a writ of certiorari was filed on May 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's actions contemptuous of court orders were protected by the First Amendment.

2. Whether the injunction was issued in keeping with Rules 17 and 65 of the Federal Rules of Civil Procedure.

3. Whether petitioner was put in double jeopardy by being tried in this case after he had previously been found guilty of another, separate, contempt of the same order of the District Court.

4. Whether the District Court had jurisdiction to issue the injunction.

5. Whether the District Court's determination that a juror was not influenced by a television program depicting him as a fair and impartial person is supported by the evidence.

6. Whether the District Court properly instructed the jury with respect to the state of mind of the victim of the assault perpetrated by the petitioner's co-defendants.

7. Whether the District Court erred in permitting the distribution to the jury of a handbook for jurors prepared under the authorization of the Judicial Conference.

8. Whether the District Court correctly refused to order pretrial inspection of statements by prospective witnesses made to the Federal Bureau of Investigation, and whether it properly screened such statements to determine whether they were related to events referred to in the testimony.

STATUTE AND RULE INVOLVED

1. Rule 30, Federal Rules of Criminal Procedure:

> At the close of the evidence or at such earlier time during the trial as the court reasonably

directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

2. 18 U.S.C. 3500. *Demands for production of statements and reports of witnesses.*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order

it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from

the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

This case is a companion to *Bullock et al.* v. *United States*, No. 868, this Term, certiorari denied, June 15, 1959, and arises out of the same circumstances: On January 4, 1956, the District Court for the Eastern District of Tennessee issued an order in *McSwain* v. *Board of Education of Anderson County*, 138 F. Supp. 570, directing the discontinuance of racial segregation in the high schools of Anderson County, Tennessee, by the fall term of 1956. Pursuant to the order, a number of Negroes were registered, and in August 1956, when school opened, 12 Negroes were enrolled in Clinton High School, Clinton, Tennessee (R. 472, Vol. II).[1] On August 25, 1956, petitioner

[1] This reference is to the original transcript of testimony at the trial, which was filed in this Court in *Bullock et al.* v. *United*

John Kasper arrived in Clinton and took various steps designed to oust the Negroes from the high school (R. 604–5, Vol. II). A petition was filed in the District Court for injunctive relief, and on August 29, 1956, that court issued a temporary restraining order enjoining John Kasper and others, and "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them," from interfering with the carrying out of the desegregation order (R. 52–4, Vol. I). Thereafter, after a hearing, a preliminary injunction issued and, after a further hearing, on September 6, 1956, the injunction was made permanent (R. 59, Vol. I).

On December 5, 1956, the United States Attorney filed a petition charging sixteen persons with criminal contempt for violating the injunction (R. 14a–15a). An order of attachment was issued by the court pursuant to this petition (R. 34–8, Vol. I). On February 25, 1957, the court issued an amended order of attachment which stated that the said sixteen persons in active concert and participation with Kasper had violated the injunction by interfering with the desegregation order by (1) congregating in a threatening manner along the route to Clinton High School taken by the Negro students and intimidating these students from entering the school, and (2) vilifying, attacking, and badly beating Reverend Turner when he escorted

States, No. 868, this Term. Pages cited as R. 1a, etc., refer to petitioner's appendix filed in the Court of Appeals and now on file in this Court as petitioner's record. Similarly, pages cited as R. 1b, etc., refer to the Government's appendix in the court below, on file in this Court. R. 1c, etc., refers to the transcript of evidence introduced on motions for new trial.

the Negro students to the school on December 4, 1956 (R. 40–47, Vol. I).

At the trial on July 8, 1957, it was shown that a concert of action existed between petitioner Kasper and the other defendants. Kasper, Cook, and Charles Currier (husband of Mary Neil Currier) were among the original incorporators of the Tennessee White Citizens Council (R. 448, Vol. I). Kasper was seen at at least one of their meetings along with Cook (R. 452, Vol. I) at the Embassy Club (R. 449, Vol. I). About once a week from August to December 1956, Kasper met at Ann's Cafe and the Southland Cafe from about 7 p.m. to 10 p.m. with Brakebill, Cook, Till, Mrs. Currier, Bullock, Brantley, and others (R. 730–39, Vol. II). Members of the White Citizens Council were also observed congregating in these restaurants and the streets nearby (R. 431, Vol. I). Kasper promised to evict the Negroes from the school (R. 474, Vol. II). He met with school students in Southland Cafe (R. 429–30, Vol. I) and in November 1956, he assisted them in obtaining a charter for the Tennessee White Youth. They all rode to the home of the notary with Cook in his car and either Kasper or Cook paid the incorporation fee (R. 501–503, 563–71, Vol. II). The first meeting was held at the Embassy Club with Brantley's permission (R. 517–18, Vol. II) and in attendance were Kasper, Till, Brakebill, and Brantley (R. 570–71, 592, Vol. II).

Evidence was also adduced that, subsequent to these organizational events, every school-day morning between November 27 and December 3, 1956, several of Kasper's co-conspirators congregated and stationed

themselves in a threatening manner at a street intersection which the Negro children had to pass to get from their homes to the high school (R. 972–78, Vol. III). As a result, the Negro children did not go to school on those days.

On December 4, those persons again parked their cars in the area of the road leading from the Negro section to the school. Threatening remarks were made by several of them to the effect that they would prevent the Negroes from going to school (R. 612, 816–17, Vol. II). Later that morning, Reverend Paul Turner escorted the Negro children through the crowd to the school. On his way to school, Reverend Turner was threatened (R. 644–50, 816–17, 820, 824, 832–34, Vol. II) and when he came back out, Cook and others struck him (R. 835, 838–39, Vol. II; 894, 897, 928–29, 956, 957, Vol. III). In the course of the beating, Turner went down on his knees and his head was bounced against the fender of a car (R. 897, Vol. III). A mob was shouting "kill him" (R. 928–29, Vol. III). Ultimately, the police arrived and Cook was arrested (R. 868, Vol. II).

At the conclusion of the contempt hearing, Kasper and some of his co-defendants were found guilty, while several others were acquitted (R. 1192, Vol. III). Kasper was sentenced to a term in prison and all of the other convicted co-defendants were sentenced to probation for varying terms. Motions for a new trial were denied.

On February 27, 1959, the Court of Appeals affirmed the judgment of the District Court with respect to Kasper and the others. Kasper filed a peti-

tion for a rehearing in that court, which was denied on April 30, 1959.

ARGUMENT

Many of the issues presented by this petitioner are identical with, or similar to, questions raised by the co-defendant petitioners in *Bullock et al.* v. *United States*, No. 868, this Term, certiorari denied, June 15, 1959.[2] There is no more reason to grant review to this petitioner than there was in the case of his co-defendants.

1. It is first argued (Point 1, Pet. 7–9) that the injunction issued by the District Court was repugnant to the First Amendment. Perhaps the best short answer is that given by the Court of Appeals when it passed on the same question involving the same injunction in connection with Kasper's first contempt (*Kasper* v. *Brittain*, 245 F. 2d 92, 95 (C.A. 6), certiorari denied, 355 U.S. 834):

> The right to speak is not absolute and may be regulated to accomplish other legitimate objectives of government. The First Amendment does not confer the right to persuade others to violate the law. *Giboney* v. *Empire Storage Company*, 336 U.S. 490, 502 * * *. The speech here enjoined was clearly calculated to cause a violation of law and speech of that character is not within the protection of the First Amendment, *Dennis* v. *United States*, 341 U.S. 494 * * *; *Feiner* v. *People of State of New York*, 340 U.S. 315; *Beauharnais* v. *People*

[2] For the Court's convenience, we set out our answers *in extenso*, without reference to our brief in opposition to the *Bullock* petition.

of State of Illinois, 343 U.S. 250 * * *; *Chaplinsky* v. *State of New Hampshire*, 315 U.S. 568 * * *.

Petitioner cites decisions having but the most tenuous relationship with the factual and legal situation of this case. None involves an injunction prohibiting the obstruction of a court order, and none passes on circumstances such as those presented here. Kasper's defense in the name of free speech to lawlessness resulting in the intimidation of small children seeking their constitutional rights, and the beating of a minister who came to their aid, strains understanding.

2. Petitioner makes several procedural arguments (Point 2, Pet. 9–13), none of which has merit.

(*a*) He argues that the injunction was issued in violation of Rule 17 of the Federal Rules of Civil Procedure, concerning real parties in interest. The standing of the parties who sought this injunction was sanctioned in the first contempt proceedings. *Kasper* v. *Brittain, supra.* Since Kasper did not appeal the order of injunction, he cannot now raise the question. *United States* v. *United Mine Workers*, 330 U.S. 258; *Jennings* v. *United States*, 264 Fed. 399 (C.A. 8). In any event, the interest of the petitioning parties was very real indeed. They included the principal of Clinton High School, a member of the Board of Education of Anderson County, two attorneys involved in the desegregation litigation concerning the high school, and an Assistant Attorney General for the Nineteenth Judicial Circuit for the State of Tennessee (R. 2a–3a). They filed this petition in view of their official connection with the desegregation litigation of Clinton High School and their concern for the main-

tenance of respect for the laws of Tennessee and the United States and respect for the District Court and the Supreme Court of the United States (R. 3a). Clearly, they had standing.[3]

Rule 65(b) provides that no temporary restraining order be granted without notice unless it clearly appears from the specific facts pleaded that immediate and irreparable injury or loss or damage would result to the applicant before notice and hearing. The verified petition in this case (R. 2a–9a) pleaded such facts in abundance. Beyond that, a full hearing was had with respect to the preliminary and permanent injunctions, and any defect in the issuance of the temporary restraining order therefore becomes immaterial.

Finally, even if the injunction was invalid for any reason, petitioner was properly chargeable with criminal contempt for violating it. *United States* v. *United Mine Workers,* 330 U.S. 258; *Howat* v. *Kansas,* 258 U.S. 181, 189–190. See also *Maggio* v. *Zeitz,* 333 U.S. 56, 69; *Amalgamated Clothing Workers* v. *Richman Bros.,* 211 F. 2d 449, 452 (C.A. 6), affirmed, 348 U.S. 511.

(*b*) Petitioner also complains that the injunction could not be binding on him because he was not a

[3] As for the argument that the Board of Education should have petitioned in its official capacity, as in the case of *Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91 (C.A. 8), the failure to move for a joinder of the Board constitutes a waiver of the objection. See 3 Moore's *Federal Practice* (2d ed.), p. 1331, supplementary note 6; *McLouth Steel Corp.* v. *Mesta Machine Co.,* 116 F. Supp. 689 (E.D. Pa.), affirmed, 214 F. 2d 608 (C.A. 3). Moreover, Rule 17(b) merely permits but does not require an unincorporated association such as the school board to sue in its common name.

party to the original action. But he was a party to the September 1956 injunctive action, having been specifically named in the petition (R. 2a–9a), and whether or not he was a party to the original desegregation suit is immaterial. *Reich* v. *United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004; *Garrigan* v. *United States*, 163 Fed. 16 (C.A. 7), certiorari denied, 214 U.S. 514. He was not here charged with violating the order of January 4, 1956 (*supra*, p. 5); he was charged with and found guilty of violating the permanent injunction issued on September 6, 1956 (*supra*, p. 6) (R. 36a). He was a party to the proceedings involving that order; it was served upon him; and he had actual notice thereof.

(*c*) Kasper also says that his motion for a bill of particulars should have been granted, but nothing is cited in support of the bare contention. Actually, the amended order of attachment, issued on February 25, 1957, is particular as to the acts charged, the dates of their occurrence, and the persons alleged to be guilty of committing them. It lists several specific overt acts (R. 42–47, Vol. I). It amply satisfied the requirements of notice; there was no abuse of discretion. *Wong Tai* v. *United States*, 273 U.S. 77; *Himmelfarb* v. *United States*, 175 F. 2d 924 (C.A. 9), certiorari denied, 338 U.S. 860.*

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*Petitioner's Point 2d (Pet. 13) appears to be identical with his Point No. 13 (Pet. 27–28). See pp. 18–20, *infra*. As for the contention that there was a denial of the right to a speedy trial (Point 16, Pet. 31), it is clear that there was neither arbitrary action nor prejudice. See *Beavers* v. *Haubert*, 198 U.S. 77; *United States* v. *Holmes*, 168 F. 2d 888 (C.A. 3); *Chinn* v. *United States*, 228 F. 2d 151 (C.A. 4).

3. Petitioner claims double jeopardy (Point 3, Pet. 13–14) because this is the second time he has been found guilty of contempt of the order of the District Court. This contention likewise has no substance. The first finding of guilty was for an individual act of contempt of the restraining order occurring on August 29, 1956. The present judgment was for a second separate contempt of the permanent injunction (R. 42, Vol. I) in November and December, 1956, by Kasper and several others. That Kasper was found guilty of one contempt of court did not immunize him from punishment for subsequent contemptuous conduct. He was no more protected from a second finding of contempt than a narcotics peddler is immune from two convictions for two sales of heroin made several months apart. See *Tobin* v. *Pielet*, 186 F. 2d 886 (C.A. 7).[5]

4. Petitioner questions the jurisdiction of the District Court to issue the injunction (Point 4, Pet. 15–20). The restraining order and the injunctions specifically refer to the January 1956 order concerning desegregation, and enjoin its violation. Undoubtedly, a court has jurisdiction to enforce and to prevent violations of its own orders. See 28 U.S.C. 1651; *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239. This

[5] The cases cited by petitioner are readily distinguishable since their holdings concern examination of recalcitrant witnesses and stand only for the principle that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry. The jury found from the evidence here that Kasper committed contempt in November and December of 1956. This contempt was neither charged nor punished in *Kasper* v. *Brittain*, *supra*.

ancillary jurisdiction extended to petitioner even though he was not a party to the original suit which resulted in the desegregation order. *Reich* v. *United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004; *Dickey* v. *Turner*, 49 F. 2d 998 (C.A. 6); *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (C.A. 8).*

5. Petitioner contends (Point 11, Pet. 25–27) that the District Court erred in refusing to grant a new trial because a juror viewed a television program in the course of which that juror was referred to as a citizen of honesty and integrity who could be depended upon to render an honest verdict.

The District Court found that the juror was not influenced in his verdict by reason of the program, and the Court of Appeals held that this finding was "amply supported by the evidence" (Pet. App. 24). The trial finding was made after a full hearing on the incident and after the court had reviewed the evidence with care and in detail (R. 156c–158c). In view of the innocuous nature of the broadcast, which reflected nothing more than local respect for the juror and faith in his honesty and integrity with regard to the trial, no other conclusion was possible. The facts

* This disposes also of the contentions that the court had no jurisdiction over his co-defendants (Point 17, Pet. 32), and that only the state authorities had power to deal with him (Points 6 and 8, Pet. 22, 23–24). As for the remainder of Point 8—that petitioner should have been indicted rather than proceeded against by contempt—see *Green* v. *United States*, 356 U.S. 165.

It is, of course, wholly unnecessary to notice petitioner's attack (Point 5, Pet. 20–21) on *Brown* v. *Board of Education*, 347 U.S. 483. See *Cooper* v. *Aaron*, 358 U.S. 1.

cannot be so viewed as to compel disregard of both the discretionary power of the trial judge on a motion for a new trial and the determination of the Court of Appeals that he was right in his ruling. Cf. *Gicinto* v. *United States*, 212 F. 2d 8 (C.A. 8); *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (C.A. 2), certiorari denied, 353 U.S. 984; *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), certiorari denied, 335 U.S. 830; *Miller* v. *Commonwealth*, 40 F. 2d 820 (C.A. 6); see, also, 31 A.L.R. 2d 417.

Petitioner relies upon *Remmer* v. *United States*, 347 U.S. 227, for the proposition that a presumption of prejudice exists. But *Remmer* dealt with *private* contacts with the jury which went to the merits of the case then on trial. Here, the medium of communication was public and did not touch on the merits or on petitioner. The general rule with respect to the public media of communication was enunciated by Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245 at 251:

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.

When jurors happen to be exposed to radio reports, television programs, and newspaper articles concerning the trial—despite the admonitions by the trial judge—the facts must be aired thoroughly and the judge satisfy himself that in fact no prejudice existed. In this case, the trial judge complied with that rule,

and there is no reason to overturn his findings which have been confirmed by the Court of Appeals.[7]

6. It is also claimed (Point 14, Pet. 28–29) that the District Court erred when it charged that Reverend Turner's action of escorting the Negro children to the school was a "good deed." What the court did say was that "*From the standpoint of integration what he did was a well-intentioned contribution.* Now the jury is called upon to determine whether his being afterwards beaten had the retroactive effect of *undoing the good deed* done by him earlier in the morning" (R. 1172, Vol. III) (emphasis added). In context the statement was a proper comment on the evidence. See 9 Wigmore, *Evidence*, Section 2551 (3d ed.). Additionally, when counsel objected to this portion of the charge, the court gave a supplemental instruction in which it stated, in pertinent part (R. 1187, Vol. III):

> * * * I said to you in the course of the charge that, from the standpoint of integration what Reverend Turner did was a well-intentioned contribution. *From the standpoint of segregation it might not be considered a well-intentioned contribution.* * * * If his intention had any bearing on that question, his intention on the occasion in question is a question of fact for the jury to determine * * * [Emphasis added.]

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[7] This case is unlike *Marshall* v. *United States*, No. 383, this Term, decided June 15, 1959, for the prejudicial newspaper articles there involved dealt with an issue directly related to the trial (entrapment), whereas the program in this case made no mention of the issues but dealt solely with the juror as a person.

After this supplemental instruction had been given, the court asked whether there were any further objections to the charge, and counsel for petitioner replied in the negative (R. 1188, Vol. III). The present claim of error is therefore foreclosed by Rule 30, F.R. Crim. P.[8]

7. It is also urged (Point 15, Pet. 30–31) that the District Court erred in permitting the distribution to the jury prior to trial of a pamphlet known as the "Handbook for Jurors Serving in the United States District Courts". The practice of distributing this booklet has been attacked in several circuits, but in no case has it caused a reversal. *United States* v. *Allied Stevedoring Corporation*, 258 F. 2d 104 (C.A. 2), certiorari denied, 358 U.S. 841; *United States* v. *Gordon*, 253 F. 2d 177, 184–5 (C.A. 7); *Horton* v. *United States*, 256 F. 2d 138 (C.A. 6); *United States* v. *De Marie*, 261 F. 2d 477 (C.A. 7). In the *Allied Stevedoring* case, *supra*, the court stated (at p. 107): "We find nothing improper in the use of the Handbook. In fact we believe that it accomplishes a necessary purpose and that its use should be encouraged." And, as the Court of Appeals here suggested, petitioner's objection came too late in any event since it was not made on the *voir dire*. See *United States* v. *Gordon*, *supra*; *United States* v. *Allied Stevedor-*

[8] The Court of Appeals found that the District Court's charge to the jury was "fair and accurate" (Pet. App., 16). In view of this finding and of the petitioner's failure to specify wherein the charge was prejudicial, his Point 9 (Pet. 24), alleging that the jury was permitted to speculate as to his associations, is without merit.

ing Corp., supra; *United States* v. *Mathison*, 256 F. 2d 803 (C.A. 7), certiorari denied, 358 U.S. 857.[9]

8. Petitioner questions (Points 2d and 13, Pet. 13, 27–28) whether the District Court was justified in denying the request for a pretrial inspection of statements given to the Federal Bureau of Investigation by potential witnesses. This issue is fully discussed in the Government's brief in *Rosenberg* v. *United States*, No. 451, this Term, at pp. 30–42. As there pointed out, the Court in *Jencks* v. *United States*, 353 U.S. 657, was not concerned with pretrial inspection, and most of the courts which have had occasion to consider this question have concluded that such inspection is not compelled. See, *e.g.*, *United States* v. *Rosenberg*, 257 F. 2d 760 (C.A. 3), No. 451, this Term; *United States* v. *Grossman*, 154 F. Supp. 813 (D.N.J.); *United States* v. *Grado*, 154 F. Supp. 878 (W.D. Mo.); *Papworth* v. *United States*, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Benson*, 20 F.R.D. 602 (S.D.N.Y.); *United States* v. *Palermo*, 258 F. 2d 397 (C.A. 2), No. 471, this Term. The Senate Report on the bill designed to clarify the various lower court interpretations of *Jencks* indicated that the Judiciary Committee felt that any construction of *Jencks* requiring pretrial inspection was surprising inasmuch as the "overwhelming judicial thought * * * [is that *Jencks*] does not apply to pre-

[9] Petitioner's Points 7 and 10 (Pet. 22–23, 24), in which he alleges that the verdict was not supported by the evidence, are essentially fact questions which are not a proper subject for review on certiorari. In any event, there was ample evidence to support the verdict. See the Statement, *supra*, pp. 7–8.

trial production * * *." S. Rep. No. 981, 85th Cong., 1st Sess., Appendix, p. 8.

Beyond that, the "Jencks" Act, 18 U.S.C. 3500, *supra*, pp. 3–5, explicitly provides that "* * * no statement or report * * * shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." In view of this clear prohibition on pre-trial discovery of such statements, and since any new trial would have to be held under the procedural rules laid down by Section 3500, it is unnecessary in this case to decide whether *Jencks*, taken by itself, would direct pre-trial discovery. See *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905; *United States* v. *Tomaiolo*, 249 F. 2d 683 (C.A. 2); *Papworth* v. *United States*, *supra*. Consideration of the claimed error in the light of the changed law does not violate the constitutional *ex post facto* prohibition. *Hopt* v. *Utah*, 110 U.S. 574; *Thompson* v. *Missouri*, 171 U.S. 380. See the Government's brief in *Lev, et al.* v. *United States*, Nos. 435–437, this Term, at 65–67.

Petitioner further asserts (Point 12, Pet. 27–28) that the court should not have screened the FBI reports. This Court, in *Jencks*, did not prohibit all screening by the trial judge; on the contrary, it held that a foundation for inspection must still be laid, in that it must be established that the reports are "of the events and activities related in [the] testimony." (353 U.S. at 666). See the Government's brief in *Rosenberg* v. *United States*, *supra*, pp. 42–62. In the instant case, the trial court generally allowed the signed statements of the witness to be turned over to

the defendant prior to direct examination and without any prior screening, which is a more liberal practice than *Jencks* requires (R. 158, 159; 242; 305; 424; 454, Vol. I; 495; 574; 588; 603; 634 (excised portion was either subsequently given to defense or was not requested); 766; 774; 781; 802; 860, Vol. II; 892; 927; 943; 952; 959; 963–4, Vol. III). In only a few cases were portions excised by the court and then on the ground that the particular fragment was unrelated to the testimony of the witness (R. 208, 227; 296, Vol. I; 493; 717, 744, Vol. II; 877–878, 891; 933, Vol. III). The excised portions were sealed and filed as Exhibits 4, 6, 23, 27, 28, and 30, respectively.[10] Petitioner was not prejudiced by the court's rulings in this respect and thus has no just cause for complaint. See *United States* v. *Miller, supra.* And of course with respect to this issue, too, 18 U.S.C. 3500 cured any defect. See the Government's brief in *Scales* v. *United States,* No. 488, this Term at 99–110, and *Lev, et al.* v. *United States,* Nos. 435–437, *supra.*

[10] The exhibits in this case were filed with this court with the transcript of record in *Bullock, et al.* v. *United States,* No. 868.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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